

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

To be argued by
LOUIS A. TIRELLI

77-1310

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

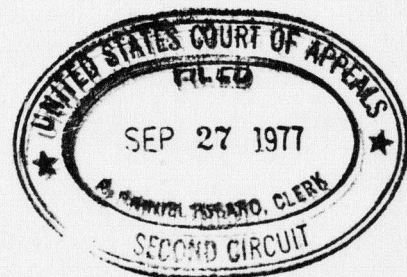
FABIO GALLEGO-HENEO,

Defendant-Appellant.

-----X

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT

LOUIS A. TIRELLI
Attorney for Defendant-Appellant
52 South Main Street
Spring Valley, New York 10977
(914) 352-4247



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

FABIO GALLEGO-HENEO,

Defendant-Appellant.
-----X

BRIEF FOR DEFENDANT-APPELLANT

Statement of the Case

Defendant-Appellant was indicted in the United States District Court, for the Eastern District of New York. The indictment is a superseding indictment of an original indictment alleging only a conspiracy against the defendant. Count One of the superseding indictment covers the crime of knowingly, intentionally and wilfully combine, conspire, confederate and agree together and with each other to violate Sections 841(a)(1), 952(a) and 960(a)(1) of Title 21, United States Code. Count Two covers the crime of knowingly and intentionally importing into the United States from Columbia approximately 1473 grams of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. Finally, Count Three covers the crime of knowingly and intentionally possessing with intent to distribute approximately 734 grams of cocaine hydrochloride, a Schedule II narcotic drug controlled substance.

Thus, Counts Two and Three were substantive crimes, while Count One was the conspiracy crime. Defendants LEON OVIDIO RODRIQUEZ and FABIO GALLEGO-HENEO, the Defendant-Appellant herein, pleaded not guilty

to the crimes charged. On April 25, 1977, the Defendant-Appellant herein appeared before Presiding Magistrate Jacob Mishler for hearings and a trial. Although the co-defendant, LEON OVIDIO RODRIQUEZ, was also scheduled to appear on the same date, he failed to appear and subsequently the Honorable Chief Judge Jacob Mishler revoked his bail and issued a bench warrant.

The Defendant-Appellant herein was then granted a hearing on questions presented in pre-trial motions for purposes of determining the voluntariness of statements made by the Defendant-Appellant after his arrest, the question of the legality of a search of Defendant-Appellant's apartment subsequent to the arrest, and finally, but most importantly, a question of the inordinate delay of arraignment of Defendant-Appellant. Chief Judge Mishler found for the Government on all three issues, but after determining that after the sixth hour of Defendant-Appellant's arrest, there was no further incriminating statements or actions made against the Defendant-Appellant by the Government, he found for the Government and permitted the Government to introduce all such evidence at the trial.

The trial of the Defendant-Appellant proceeded immediately after the hearing, and on May 2, 1977, the jury in this case returned a guilty verdict on all three counts against the Defendant-Appellant.

The Court set June 17, 1977, for sentencing but then adjourned the sentencing to July 15, 1977, at the request of the Defendant-Appellant's attorney. On that day, the Defendant-Appellant was sentenced to two years in prison with special parole of five years.

A Notice of Appeal was immediately filed by the Defendant-Appellant's attorney subsequent to sentencing.

Question Presented

Does an "unnecessary delay" by the Government in arraigning a suspect adversely affect the admissibility of confessions and other inculpatory statements obtained during a period of unnecessary delay?

The pre-trial motion to the Honorable Presiding Justice Jacob Mishler answers this question in the negative, specifically on the ground that all statements and inculpatory evidence was obtained during the first six hours of the arrest.

Argument

THE FAILURE OF THE COURT TO DENY THE
ADMISSIBILITY OF CONFESSIONS AND
OTHER INCULPATORY STATEMENTS OBTAINED
DURING A PERIOD OF UNNECESSARY DELAY
ADVERSELY AFFECTED THE RIGHTS OF THE
DEFENDANT-APPELLANT, FABIO GALLEGOS-
HENEZ, AND CAUSED A MANIFEST MIS-
CARRIAGE OF JUSTICE.

It is the Defendant-Appellant's contention that Rule 5 of the lower Court under 18 U.S.C.A. Section 3501 and applicable case law precludes the use during trial of any evidence obtained against the Defendant-Appellant after an unnecessary delay made by the U.S. Government in arraigning the Defendant-Appellant after his arrest.

It has been held under the McNabb-Mallory Rule that "the admissibility of confessions and other inculpatory statements obtained during a period of unnecessary delay be declared unreasonable, illegal and void ab initio, in order to deter violations of Rule 5(a). The Supreme Court, in U.S. v. Klapholz, C.A.2d, 1956, 230 F.2d, 494, 498, has held that in order for Rule 5(a) to have the purpose intended, it requires the exclusion of "all evidence obtained by federal agents through access

to persons while detained in violation of Rule 5(a)". This exclusion has been taken to include tangible evidence obtained from the arrested person by reason of his arrest in both Watson v. U.S., C.A.1957, 249 F.2d 106, 109, 101 U.S.App.D.C. 350, and U.S. v. Klapholz, C.A.2d, 1956, 230 F.2d 494, 498; it has also been taken to include the observation by an officer of reenactment of the crime by the accused in Naples v. U.S., C.A.1962, 307 F.2d 618, 621-622, 113 U.S.App.D.C.681. Lastly, it has been taken to include fingerprints taken during a period of unnecessary delay, see U.S. v. Smith, D.C.D.C.1962, 31 F.R.D. 553, 560-561 and Bynum v. U.S., C.A.1958, 262 F.2d 465, 467, 104 U.S.App.D.C. 368.

The whole purpose of the McNabb-Mallory rule can be easily defeated if the Government is allowed to collaterally bring in evidence obtained from a defendant during an extended period subsequent to arrest but prior to arraignment. The Government can be permitted to defeat the McNabb-Mallory rule by avoiding the Magistrate's warning to the accused that he need not say anything and obtaining all such information as early in the arrest as possible and then only using the subsequent time period for purposes of causing the accused to give the Government additional collateral information which would help in prosecution of the arrested person. The fruit of the "unnecessary delay" must be precluded by the trial judge from being used in evidence against the arrested person.

It is respectfully submitted to this Honorable Court that the Defendant-Appellant was arrested at 10 p.m. on February 25, 1977, (T100), and then, in spite of the fact that the Magistrate's office was nearby and open both on Saturday morning, February 26, 1977, and Sunday morning, February 27, 1977, he was not arraigned until Monday, February 28, 1977, at 3:40 p.m. (M2).

During the period that the Defendant-Appellant was incarcerated but before he was arraigned, the Federal Government developed sufficient evidence that was introduced throughout the trial regarding telephone calls answered by the Defendant-Appellant while in his own house ^{UNDER} on the control of the Drug Enforcement Administration agents (T228-229). The arrest of Mr. Jaramillo (T230), who was used extremely effectively by the Government to prove the Government's case, the introduction of keys on a ring marked "Government's Exhibit 12" (T234), and indeed the very arrest of Leon Rodriguez (T237), all occurred subsequent to the six-hour period after arrest.

The fruit of "unnecessary delay" herein adversely affected the Defendant-Appellant's defense in the lower Court and evidence was used against the Defendant-Appellant even beyond the sixth hour as ruled on by the trial judge by the use of the testimony or manner of evidence and testimony obtained during the period that the Defendant-Appellant was incarcerated in his own home without being given the right to arraignment. For Rule 5(a) to be given more than lip service, it is mandatory upon this Court that they enforce its operation so that future arrests will not be tainted as in the trial below.

It is thus respectfully submitted that this Court should find reversible error and either grant the Defendant-Appellant a new trial with a direction that all evidence determined after his arrest be precluded or to reverse the verdict of the jury.

Conclusion

FOR THE REASONS ABOVE STATED, THE
VERDICT OF THE JURY SITTING IN THE
FEDERAL EASTERN DISTRICT COURT
SHOULD BE REVERSED, OR, IN THE
ALTERNATIVE, A NEW TRIAL GRANTED
WITH A DIRECTION THAT ALL EVIDENCE,
BOTH INCULPATORY AND EXCULPATORY,
OBTAINED SUBSEQUENT TO THE ARREST
BE PRECLUDED FROM BEING ENTERED
THEREIN BY THE FEDERAL GOVERNMENT.

Dated: Spring Valley, New York
September 12, 1977

Respectfully submitted,

LOUIS A. TIRELLI
Attorney for Defendant-Appellant
52 South Main Street
Spring Valley, New York 10977
(914) 352-4247

APPENDIX

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APPEAL

ABIO CALLEGIO-HENAO

37

77

12

21:841(a)(1) and 960(a)(1) and 963 import cocaine, possess and to distribute same

1

\$100

2-28-77

X

KEY DATES & INTERVALS

ARREST

INDICTMENT

X

ARRAIGNMENT

TRIAL

SENTENCE

3-7-77

3/14/77

4/25/77

4/25/77

5/7/77

2-28-77

4.20.77

4/24/77

5/2/77

MAGISTRATE	
SEARCH WARRANT	ISSUED
SUMMONS	SERVED
ARREST WARRANT	FILED
COMPLAINT	FILED
OFFENSE	(in Complaint)
2-28-77	ASC/07AE
Possession with intent to distribute cocaine.	
T-21 USC Section 841(a)(1).	

U.S. Attorney or Asst

Richard Huffman

ATTORNEYS

P. Katowitz, Esq.
Martin Schmukler
345 Park Avenue, NYC
371-1400

Louis--Tirelli L.A.S.
--52-So. Main St.
Spring Valley, NY 10977
914-352-4247

* Show last names and index numbers of other defendants on same indictment information

Leon Ovidio Rodriguez

DATE	PROCEEDINGS	EXCLUDABLE DELAY
3-7-77	Before CATOGGIO, J - Indictment filed	(a) (b) (c) (d)
3/14/77	Before MISHLER, CH. J. - Case called. Deft & Counsel present. Deft arraigned and enters a plea of not guilty on his own behalf. Bail set at \$50,000 PRB signed by his wife and landlord as surety, also \$7,500.00 cash deposit and the house where he lives. April 25, 1977 for trial. Certificate of engagement to be issued. (**THIS ENTRY APPLIES TO LEON OVIDIO RODRIGUEZ)	
3-15-77	Letter filed received from Chambers to counsel setting case for trial on 4-25-77 at 10:00 am. Certificate of Engagement attached and filed.	
3-15-77	Notice of appearance filed.	
3/16/77	By CHREIN, J. - Order for acceptance of cash bail filed.	
3-25-77	Notice of readiness for trial filed	
3-30-77	Notice of appearance filed	
3/31/77	Copy of letter filed to Mr. Tirelli, from Jacob Mishler dtd 3/30/77, re: substitution of counsel - from Louis Tirelli, Esq to L.A.S.	

ORU

3/31/77	By N. [illegible] Certificate of engagement filed.	
4.20.77	Notice [illegible] Evidence returnable 4-22-77 at [illegible] and forwarded to [illegible].	GP
4.20.77	Before U.S. Magistrate, Ontario, V.- SUPERSEDING INDICTMENT FILED.	GP
4.22.77	Before Mishler, J.- Case Called. Hearing set down for 4.25.77 before Trial at 9:30 A.M.	GP
4.22.77	Before Mishler, J.- Case Called. Deft. present with Counsel. Deft. arraigned and enters a plea of not guilty. Deft's. same bail conditions as in 77 CR 125. 4.25.77 for Trial.	GP
4/25/77	Before Mishler, Ch J-case called-deft Gallego-Henao present-w/counsel, interpreter Jabilio Achoa present. hearing held on motion to suppress as to deft Henao. Govt rests in the hearing-hearing on motion to suppress concluded-motion to suppress is denied as indicated on the record-hearing reopened on the motion to suppress hearing concluded-further findings by the court denying the motion to suppress was indicated on the record-trial ordered & begun as to deft Henao-jurors was selected & sworn-trial contd to 4/26/77.JLJ	
4/26/77	Before Mishler, Ch J-case called-deft Henao present with counsel-trial resumed-motion by the deft for a judgement of acquittal is denied-trial contd to 4/28/77.JLJ	
4/28/77	Before Mishler, Ch J-case called-deft Henao present with counsel-trial resumed-deft rests-trial contd to 5/2/77.JLJ	
5/2/77	Before Mishler, Ch J-case called-deft & counsel present trial resumed-At 11:10am the jury retired for deliberation-At 2:45pm the jury returned and rendered a verdict of guilty on counts 1, 2 & 3-jury pulled-jury discharged-trial concluded-motion reserved until time of sentencing-sentence adjd w/o date-bail condition contd.JLJ By Mishler, Ch J-Order of sustenance.JLJ	
5/3/77	Voucher for expert services filed and forwarded for payment.rs	
5-11-77	Transcript filed dated 4-28-77.	
5-17-77	Transcript filed dated May 2, 1977.	
5.24.77	Stenographer's Transcript dated April 26th, 1977 filed.	GP
5.24.77	Stenographer's Transcript dated April 25th, 1977 filed.	GP
6/17/77	Before Mishler, Ch J-case called-sentence adjd to 7/1/77 on consent.jlj	
6-20-77	Copy of letter filed confirming sentence of deft scheduled for July 15, 1977 at 10 am.	

[illegible]

DATE	DOCKETINGS (continued)
7-15-77	Before MISHLER, CH J - case called - deit & counsel Louis Tirelli present. Deit is sentenced to imprisonment for 2 years plus special parole term of 5 years on each of counts, 1, 2 and 3 - all said sentences to run concurrently. Clerk is directed to file a Notice of appeal without fee. Bail contd pending appeal.
7-15-77	Judgment and commitment filed - certified copies to Marshal.
7-15-77	Notice of appeals filed (no fee) Docket entries and duplicate of notice mailed to the court of appeals.
8-5-77	Voucher for compensation of counsel Benjamin Demos filed and forwarded for payment.
8-8-77	Scheduling order filed that the record on appeal be docketed on or before 8-12-77.

AO 256A

Interval
(per Section II)

Start Date
End Date

Ltr. Total
Cdd. Days

DAD:ZWC:sd
F.# 771252

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ APR 20 1977 ★

TIME A.M. _____
P.M. _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

SUPERSEDING INDICTMENT

- against -

Cr. No. 77 CR 125(S)
(T. 21, U.S.C., §§841(a)(1)
846, 952(a), 960(a)(1) and
§963)

LEON OVIDIO RODRIGUEZ and
FABIO GALLEGO-HENEO,

Defendants.

----- X

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 1st day of February 1977 and the 26th day of February 1977, both dates being approximate and inclusive within the Eastern District of New York and elsewhere, the defendants LEON OVIDIO RODRIGUEZ and FABIO GALLEGO-HENEO together with others known and unknown to the Grand Jury did knowingly, intentionally and wilfully combine, conspire, confederate and agree together and with each other to violate Sections 841(a)(1), 952(a) and 960(a)(1) of Title 21, United States Code.

1. It was part of said conspiracy that the defendants and others would knowingly and intentionally import into the United States from places outside thereof quantities of cocaine, a Schedule II narcotic drug controlled substance.

2. It was further a part of said conspiracy that the defendants and others would knowingly and intentionally distribute and possess with intent to distribute quantities of cocaine, a Schedule II narcotic drug controlled substance.

3. It was further a part of said conspiracy that the defendants and others would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Section 846 and Section 963.)

COUNT TWO

On or about the 25th day of February, 1977, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendants LEON OVIDIO RODRIGUEZ and FABIO GALLEGO-HENEO, did knowingly and intentionally import into the United States from Columbia approximately 1473 grams of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §952(a); §960(a)(1) and Title 18, United States Code, Section 2).

COUNT THREE

On or about the 25th day of February, 1977, within the Eastern District of New York, the defendants LEON OVIDIO RODRIGUEZ and FABIO GALLEGO-HENEO did knowingly and intentionally possess with intent to distribute approximately 734 grams of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1) and Title 18, United States Code, Section 2.)

COUNT FOUR

On or about the 24th day of February, 1977, within the Eastern District of New York, the defendant LEON OVIDIO RODRIGUEZ did knowingly and intentionally possess with intent to distribute approximately 497.97 grams of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1).)

A TRUE BILL.

Richard N. McHenry
FOREMAN

David G. Trager
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NEW YORK

17 CR 125

-----X
United States of America,

Plaintiff,

-against-

Fabio Gallego-Henao,

Defendant.
-----X

NOTICE OF MOTION
TO SUPPRESS EVIDENCE

S I R :

PLEASE TAKE NOTICE that upon the annexed affirmation of LOUIS A. TIRELLI, ESQ., attorney for the defendant herein, duly verified the 19th day of April, 1977, and upon the indictment herein filed on the 7th day of March, 1977, and upon all the pleadings and proceedings heretofore had herein, a motion will be made at a term for motions in the above court to be held in the United States Courthouse, 225 Cadman Plaza, on the 22nd day of April, 1977, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order declaring unreasonable, illegal and void the search made in the above-entitled action and precluding the United States Attorney from using the evidence upon the trial, and for a further order declaring that the Government has violated Rule 5 of this Court and 18 U.S.C.A. §3501, and thereby any confession or statements, both inculpatory and exculpatory, made by the defendant should be suppressed, and any electronically-monitored telephone conversations should also be suppressed.

DATED: Spring Valley, New York
April 19, 1977

Yours, etc.,

[Signature]
LOUIS A. TIRELLI, ESQ.
Attorney for Defendant
Office and Post Office Address
52 South Main Street
Spring Valley, New York 10977
(914) 352-4247

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NEW YORK

-----X
United States of America,

Plaintiff,

-against-

Affirmation

Fabio Gallego-Heneo,

Defendant.

LOUIS A. TIRELLI, an attorney-at-law duly admitted to practice before the Courts of the State of New York, affirms the following upon information and belief:

That Fabio Gallego-Heneo, the defendant herein, resides at 89-25 Elmhurst Avenue, Queens, New York.

Affirmant respectfully makes the within application under Rule 5 of this Court, under 18 U.S.C.A. §3501, and applicable case law, so that the search of defendant's apartment at 89-25 Elmhurst Avenue, Queens, New York, made in the above-entitled action be declared unreasonable, illegal and void and that the United States Attorney be precluded from using any evidence obtained therefrom against the defendant herein; and further that all confessions and statements, both inculpatory and exculpatory, made by defendant after an unnecessary delay, including any electronically-monitored telephone conversations taped, or others, be excluded from use during trial by the United States Attorney, and lastly that any information obtained from any of the above be precluded from use as evidence against the defendant at a trial of the defendant by the United States Attorney.

On February 25, 1977, the defendant herein, Fabio Gallego-Heneo, was arrested by officers of the Drug Enforcement Administration and was charged with a conspiracy to violate Sections 841(a)(1), 952(a) and 960(a)(1) of Title 21, United States Code.

The defendant was at John F. Kennedy Airport in the County of Nassau and State of New York, when the defendant was notified by agents of the Drug Enforcement Administration that he was under arrest. After having been arrested, defendant was kept in the custody of the Drug Enforcement Administration agents and was taken to 90th Street and Roosevelt Avenue in Queens, New York, and made to remain there for approximately two hours. Defendant was then brought to his apartment at 89-25 Elmhurst Avenue, Queens, New York, while still in the custody of the Drug Enforcement Administration agents. His apartment was searched and made a shambles, and even a door to a closet in his apartment was smashed, although defendant had a key for said closet (see accompanying picture herein, Exhibit 1). Further, while at his apartment, defendant was forced to answer telephone calls, while these phone calls were being monitored by Drug Enforcement Administration agents.

Defendant was maintained in the custody of Drug Enforcement Administration agents Friday night, all day Saturday, all day Sunday, and Monday, until the afternoon at 3:40 p.m. Finally, on Monday, February 28, 1977, at 3:40 p.m., the defendant was finally brought before a magistrate to be arraigned and to be advised of his rights so that the issue of probable cause might be promptly determined. This, in spite of Rule 5 of this Court, which directs that an individual arrested must be quickly brought before a Judicial officer so that he may be advised of his rights and that the issue of probable cause may be promptly determined, occurred.

The Government will submit that the Drug Enforcement Administration agents had the defendant herein sign numerous statements and that he was advised of his rights, etc. They will further submit that in spite of the Government's giving defendant advice on his rights that the defendant voluntarily permitted Drug Enforcement Administration agents to search and make a shambles of his

house, to monitor telephone calls that the Assistant United States Attorney submits can be used against him and to do other various and sundry things that might be considered inculpatory by a jury.

It is respectfully submitted that under Section 18 U.S.C.A. §3501 that a question of voluntariness is submitted herein when a person is placed under arrest and his moves restricted by federal agents who are holding the arrested individual in custody. Under the conditions prevalent herein, there can be no voluntariness.

When a man's freedom is restricted and he is not given the opportunity of being arraigned by a magistrate or other federal officer as quickly as possible, the voluntary character of any statement, confession, or the voluntary permission to search his household is in question.

The Government was certainly aware of this situation and contrary to normal procedures for making a search of an apartment, the Drug Enforcement Administration agents operated backwards in this particular case. The search was made Friday night or in the very early hours of Saturday morning, and a warrant to search the apartment was not obtained until after the search had been fully executed by agents of the Drug Enforcement Administration three days earlier. The warrant was obtained on Monday, February 28, 1977, three days after the arrest and search of the apartment from Magistrate Vincent A. Cattoggio on an affidavit signed by John Capriano stating that his observations were made on February 26, 1977.

Further, the search was not coincidental with the arrest, but rather the arrest was made in a county outside of the county of defendant's residence. There was no reason to expect any evidence was present in defendant's household, other than the normal plastic baggies that most people might have in their household.

Accordingly, all information set forth in the affidavit for a search warrant was obtained by an illegal trespass and entry into the residence of defendant by Drug Enforcement Administration agents.

Further, the search warrant was issued at 6 p.m. on February 28, 1977, subsequent to the arraignment of the defendant herein. This was certainly not to make a search of the premises as stated in the affidavit of John Cipriano, but rather to justify the illegal search already performed by the agents and to justify the destruction of property within the apartment.

It is submitted that the Government could easily have arraigned the defendant early Saturday morning and obtained a search warrant at that same time. It is further submitted that the Drug Enforcement Administration agents violated the privacy of defendant's home and forced defendant while under arrest to receive telephone calls. Under the fruit of the poisonous tree doctrine, the telephone calls received by defendant while in his home and under arrest should be suppressed. Such suppression should include all such statements made by the defendant or to the defendant by other parties as well as any evidence seized by the Government from defendant's home.

Your affirms submits to this Honorable Court that the United States Attorney intends to use the evidence seized, the statements made by and to the defendant and the electronically-monitored telephone calls against the defendant on a trial of this cause unless an order is entered herein quashing said search warrant and suppressing the evidence obtained by said unlawful search and seizure.

Wherefore, your affirms prays that an order may be entered herein suppressing the evidence obtained by said unlawful search and seizure and all clues derived therefrom and excluding

said evidence at the trial and hearing of this cause.

Dated: Spring Valley, New York
April 19, 1977



LOUIS A. TIRELLI, ESQ.
Attorney for Defendant
FABIO GALLEGO+HENEO
Office and Post Office Address
52 South Main Street
Spring Valley, New York 10977
(914) 352-4247

CRIMINAL CASE INFORMATION
(FORM A)
FOR USE BY DISTRICT COURT,
COURT OF APPEALS, PROBATION OFFICE

This section to be completed by courtroom deputy prior to sentencing

CASE TITLE
USA
-A-
LEON OVIDIO RODRIGUEZ
FABIO GALLEG0 - HENAO
ASSISTANT U.S. ATTORNEY: NAME AND TELEPHONE
ZACHARY CARTER
330 7024

DISTRICT
EDNY
DOCKET NUMBER
77CR125(5)
JUDGE
MISHLER
DEFENDANT NAME AND ADDRESS
FABIO GALLEG0 - HENAO
89-25 ELMHURST AVE
ELMHURST, NEW YORK
DEFENDANT'S ATTORNEY
NAME AND ADDRESS
LOUIS A. TIRELLI
52 SOUTH MAIN ST.
SPRING VALLEY NY 10977
TELEPHONE
914 357 7046
☐ APPOINTED
☒ RETAINED

SENTENCING INFORMATION To be completed at sentencing by courtroom deputy

DATE OF DECISION
7/12/77
DATE OF SENTENCE
7/15/77
BAIL/JAIL DISPOSITION
NOT
☐ COMMITTED ☐ COMMITTED ☐ ROR ☐ BAIL \$
DEFENDANT FOUND GUILTY BY
☐ PLEA ☒ JURY ☐ COURT
CONVICTED ON CHARGES OF
NARCOTIC VIOLATIONS
NUMBER OF OTHER DEFENDANTS
FOUND GUILTY AFTER TRIAL
NONE
SENTENCE
2 years + 50T of 5 years
on each of cts 1, 2 + 3
concurrently

TRANSCRIPT INFORMATION To be completed at sentencing by courtroom deputy

COURT REPORTER IN CHARGE: NAME, TELEPHONE
MANUEL KARR
330-7687
Was daily copy prepared?
YES NO
X
Did Assistant U.S. Attorney order trial minutes?
YES NO
X
Did attorney for defendant order trial minutes?
YES NO
X

INFORMATION AS TO COUNSEL ON APPEAL To be completed at sentencing by judge

	YES	NO		YES	NO
Has an affidavit of financial status (CJA 23) filed?	X		Has notice of appeal been filed pursuant to defendant's request? FRCrP 32(a) (2)	X	
Does defendant's financial status warrant appointment of counsel on appeal?	X		Do you grant defendant leave to proceed on appeal in forma pauperis?	X	
Is there sufficient reason why trial counsel should not be appointed on appeal?		X	Should the trial minutes be transcribed at the expense of the United States pursuant to the Criminal Justice Act?		X

SIGNATURE OF JUDGE
Carol Mishler
NAME OF COURTROOM DEPUTY
MARTIN M ADLER
DATE
July 15, 1977
DATE NOTICE OF APPEAL FILED
July 15, 1977
USCA-2
FORM A (7-73)

2 COPY

1 MR. CARTER: I agree.

2 MR. SCHMUKLER: I don't know. If I am somehow
3 successful and proof has not begun and I can produce
4 my client, I will waive his right to have been present
5 during the jury selection. If that will in any way
6 protect the securities.

7 THE COURT: With the understanding that it will
8 have no effect on the forfeiture. The money is for-
9 feited, that is it. The only thing that it will have
10 effect on remission or application to remit will be
11 the circumstances concerning his delay in coming here
12 today.

13 Let's go on with the trial.

14 The defendant, Fabio Gallego Menao, was arrested
15 ON February 25, 1977. Was it at 10:00 o'clock?

16 MR. TIRELLI: 10:30, your Honor.

17 THE COURT: He was at the JFK Airport Pan American
18 Cargo Terminal or facility when he was arrested?

19 MR. TIRELLI: Yes.

20 THE COURT: When he picked up the newspapers he
21 was taken to the DEA office at the John F. Kennedy
22 Airport at about, I think he said 30 minutes later?

23 MR. CARTER: That is correct.

24 THE COURT: That is what Mr. Huber testified to.
25 So he arrived there, at, let's say, 10:30. He was then

1
2 Q And then what happened?

3 A At approximately 12:30 Mr. Gallego did leave
4 the apartment and proceeded towards his work.

5 Q At that time what occurred inside the apartment?

6 A At that time we instructed Herman that if
7 anyone should come to the apartment and make claims to the
8 packages that he was to act normally and allow the individual
9 to take the packages with him. If there were any further
10 telephone calls, to advise the caller his father had left
11 for work and that the packages were at his apartment for him.

12 Q Were there further calls?

13 A Yes, there was.

14 Q Could you relate the substance of those calls?

15 A Yes, sir. The caller asked Herman Gallego at
16 that time where his father was. Herman told the caller that
17 he had gone to work. The caller asked if his father had left
18 anything there for him in the apartment and Herman answered
19 yes. The caller said all right I will be by.

20 Q Did another call come in?

21 A Yes, sir.

22 Q At approximately, what time did this call come
23 in?

24 A At approximately 5:30 p.m.

25 Q What transpired in that phone call?

1
2 A The caller asked Herman, who answered the
3 telephone, if everything was all right. Herman stated that
4 yes, everything was all right and asked the caller if he
5 was coming over because he had intentions to leave the apart-
6 ment and meet with a girl and that if everything went well
7 he had intentions of bringing the girl back to his apartment.
8 The caller asked what time his father got out of work. Herman
9 told him at approximately 11:30 or 12:00 o'clock. The caller
10 asked Herman whether he had a telephone number where his
11 father had worked. Herman answered that he had not. He
12 asked the caller what time he was going to be by -- no,
13 correction on that -- the caller asked him, asked Herman
14 Gallego what time he was going to leave the house and Herman
15 answered do you have the keys. The caller stated that he did
16 not.

17 Herman at that time asked him what time are you
18 coming over here and the caller stated that he would be by
19 between nine and ten and the conversation was ended.

20 Q That was 9:00 or 10:00 p.m.; is that correct?

21 A That is correct.

22 Q What is the next thing that occurred?

23 A As I recall it approximately 6:00, 6:30 that
24 evening we heard someone at the door attempting to open it.
25 The other agents in the apartment and myself went to the bath-

1
2 room.

3 Q Do you know whether or not the door was locked
4 at that time?

5 A Yes sir, it was locked.

6 Q Was someone attempting to open it with a key?

7 A Yes.

8 Q Then what happened?

9 A The agents hid in the bathroom and an individual
10 entered. An individual who later identified as Jaramillo,
11 Mr. Jaramillo. He had a short conversation with Herman Gallego
12 and was subsequently arrested and advised of his rights.

13 Q What, if anything occurred to him before in the
14 apartment?

15 A Mr. Jaramillo advised him he had been sent to
16 the apartment to make sure that everything was all right and
17 that the bundles of paper were in the apartment. Mr. Jaramillo
18 advised us that he knew the individual that had instructed
19 him to go to the apartment, and that is William. And he gave
20 us a physical description of that individual.

21 Q What was that physical description if you recall?

22 A Hispanic male in his 40's approximately, five foot
23 seven, five foot eight with black hair combed back. Also he
24 stated that he used a cigarette holder when he smoked.

25 (Continued on next page)

1
2 to connection at that point any way.

3 MR. TIRELLI: I would like to have a -- well,
4 it is premature, but if it is subject to connection
5 I would like to have him state what the connection
6 would be Your Honor.

7 THE COURT: Let's get through with this
8 witness. One witness at a time.

9 THE CLERK: Four keys on a ring marked
10 Government's Exhibit 12 for identification.

11 (At this point the jury enters the courtroom.)

12 THE COURT: When the lawyers make an argument
13 before me I excuse the jury because they argue
14 questions of law. When they argue questions of
15 law they sometimes assume certain facts that are not
16 in evidence. So I don't want you to listen to those
17 discussions because it might confuse your consideration
18 of the evidence in the case. That is the only
19 reason.

20 DIRECT EXAMINATION

21 BY MR. CARTER: (Continuing)

22 Q You testifying a moment ago that a MR.
23 Jaramillo arrived at the apartment, opened the apartment
24 with the keys and at that point you arrested him, is that
25 correct; after you had a conversation with Mr. Gallego?

1
2 A Not exactly, sir, no.

3 Q What if anything happened?

4 A Mr. Jaramillo agreed to assist the agents.
5 In leaving the apartment he had told us that the caller
6 had instructed him to meet him one block from where he
7 was originally supposed to meet the caller. Mr. Jaramillo
8 said he was willing to go out to meet the individual that
9 had made the telephone call to assist the agents.

10 Mr. Jaramillo was allowed to leave the
11 apartment. He was followed by a special agent Cipriano
12 and myself. He was observed crossing the street.

13 Q Which street are you talking about?

14 A Roosevelt Avenue. He was called by an
15 individual by his first name Rodrigo, and the individual
16 waved him over.

17 Q Where was the individual when you observed
18 him; was the --

19 A He was across the street from Roosevelt
20 Avenue. And I was directly behind Mr. Jaramillo.
21 Mr. Jaramillo approached the individual, had a brief
22 conversation with him and subsequently Mr. Jaramillo was
23 rearrested and so was the individual he was speaking to.

24 THE CLERK: A photograph is marked Government's
25 Exhibit 13 for identification.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

AFFIDAVIT OF SERVICE

FABIO GALLEG0-HENEO,

Defendant-Appellant.
-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF ROCKLAND)

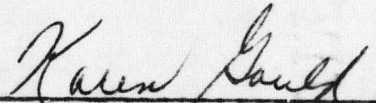
KAREN GOULD, being duly sworn, deposes and says:

I am not a party to the within action and am over the age
of 18 years. I reside at 47 Madison Avenue, Garnerville, New York 10923.

On September 12, 1977, I served a true copy of the annexed
Brief and Appendix for Defendant-Appellant by mailing the same in a sealed
envelope, with postage prepaid thereon, in a post-office or official
depository of the U.S. Postal Service within the State of New York,
addressed as indicated below:

ZACHARY W. CARTER
Assistant U.S. Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Sworn to before me this
12th day of September, 1977.


KAREN GOULD


NOTARY PUBLIC

LOUIS A. TIRELLI
NOTARY PUBLIC, State of New York
Reg. No. 3989430
Residing in Rockland County
My Commission Expires March 30, 1979

THE CLERK: Criminal cause on trial, U.S.A. vs.
Fabio Gallego-Henao.

THE COURT: Both sides ready.

MR. CARTER: Yes, sir.

MR. TIRELLI: Yes.

THE COURT: Seat the jury.

(Whereupon, jurors enter the courtroom, are
now seated in the jury box.)

THE COURT: Good morning.

Mr. Foreman and ladies and gentlemen of the
jury. We have reached that point in the trial where
it becomes my duty to charge you on the applicable
law.

I think a good starting point is to understand
and recognize the function that each individual in
a jury trial plays in a jury trial. A jury trial is
called adversary proceeding in this country; it
differs from that in other countries. In an
adversary proceeding the lawyers are the adversaries,
they take positions adverse to each other on the
issues before the jury.

For example, in this case, as you recognize
and both lawyers recognize, the critical issue is
whether the defendant knew that the newspapers import-
ed from Colombia had concealed within its fold cocaine.

Charge of the Court

The Government charging that the defendant knew, and the defendant taking the position that he did not know.

The role of the lawyer, of course, is to develop the evidence during the trial on the issues, and so the Government offered proof from which the Government asked you to infer that the defendant knew there was cocaine concealed in the newspapers, and the defendant in effect saying that the inference is unwarranted, or to put in the concept on which I'll charge you a little later, that the Government failed to prove beyond a reasonable doubt that the defendant knew that the cocaine was in the newspapers.

And that's the function of the lawyers; and the lawyers of course, are protagonists. And they represent clients and they function best when they take the position of their clients, so they are really conduits for transmitting to you the position of their respective clients; Mr. Carter for the Government, and Mr. Tirelli for the defendant.

The Court and jury are dispassionate, objective, and each of us view the case as judges, and that's what judging a case means, an objective, dispassionate review of the case; the jury viewing it as judges of the facts; the Court viewing it as a matter of law.

Charge of the Court

I have a duty to accept your fact findings. I cannot tell you how to find. I have no feeling in this case one way or the other, and I've so disciplined myself as to not consider the facts of a case, that's your job and solely your job.

On the other hand, you must respect the authority of the Court in the area of the law. The jury is the sole judge of the facts, and that means you find out what happened, and on the critical issue you determine whether the defendant was aware that he was picking up cocaine concealed in newspapers rather than just newspapers, and applying the law as I charge it, come to the ultimate decision and verdict in this case on Counts 1, 2 and 3 as to the guilt or innocence of the defendant as to each of those counts, but as I say in doing that you must recognize the authority of the Court on the question of law; and you must accept the law as the Court charges it. You may disagree with it, you may think it's a foolish law, but you have your duty to accept it.

When the jury accepts that principle, it makes for stability and predictability in law, which is most important in law. It's uniformly applied. So recognizing the role that each participant in the

Charge of the Court

trial has I'll go on to the other important principles that govern this case.

First, there is a presumption of innocence. It's a long time honored presumption in Anglo-American law. It means that you must conclude at the outset of the trial that the defendant is innocent of each and every charge in the indictment, and when I deliver these charges you must recognize it as if you were trying three cases. I'll explain each one later.

You must measure the evidence that's offered against the charge to see if the Government has proved guilt beyond a reasonable doubt, but as I say, the presumption of innocence is a strong presumption and it requires the jury to conclude at the outset of the trial, that the defendant is innocent of the charges in the indictment, and that conclusion cloaks the defendant, it's a safeguard against the charges. It's a conclusion that you must accept throughout the trial and it's enough to acquit the defendant. It only gives way when the Government has proved the guilt of the defendant by proof beyond a reasonable doubt.

There is a symbolism we sometimes use. We say the defendant starts off with a clean slate and

Charge of the Court

then the Government's evidence is introduced, and if the Government fails to overcome the presumption you must find the defendant innocent of the charges.

What is proof beyond a reasonable doubt? Proof beyond a reasonable doubt is a doubt -- rather I'll tell you what a reasonable doubt is first.

A reasonable doubt is the kind of doubt that a reasonable person would have after reviewing all the evidence in the case. It's the kind of doubt a reasonable person would have in hesitating to act in a matter of importance in his or her own life.

A reasonable doubt is not an emotional doubt, it's not the kind of doubt an individual has because of a disinclination to perform an unpleasant task. It is not a vague or speculative doubt. Proof beyond a reasonable doubt is proof of such a convincing character that you will be willing to rely upon it unhesitatingly in the most important and weighty of your own affairs. The Government's burden is not to prove the guilt of the defendant beyond all possible doubts. The Government's burden is to prove the guilt of the defendant beyond a reasonable doubt. The Government's burden is not to prove that every bit of evidence offered at the trial is true beyond a reasonable doubt;

Charge of the Court

the Government's burden is to prove all the essential elements of the crime charged beyond a reasonable doubt. A reasonable doubt may arise from the failure of the Government to produce evidence. The defendant does not have to prove his innocence. On the contrary, the defendant being presumed innocent has the right to rely on the failure of the Government to prove guilt beyond a reasonable doubt. A reasonable doubt is not based on a number of witnesses called by the Government or the number of documents introduced. When we talk about evidence in the case necessary to prove guilt beyond a reasonable doubt we mean the quality of the evidence.

(Continued on next page)

Charge

Now, what is the evidence in the case?

The evidence is the testimony of the witnesses, including the direct and cross-examination, the redirect and recross-examination. It means the documents that are introduced into evidence; it means the stipulations entered into between the parties or the facts admitted. It means those facts of which the Court took judicial notice. For example, when the Court said that February 25, was a Friday, and February 28th, was a Monday, it was a fact established by indisputable and irrevocable documents of which the Court took judicial notice. I think that it's helpful to understand what is not evidence in the case. The statements made by counsel in their openings and in their summations; the statements that the lawyers may have made that you may have heard are not evidence. Evidence comes from the mouths of witnesses sworn to tell the truth and subject to cross-examination. Statements by the Court is not evidence.

At this point I might say that I asked a few questions during the trial, you should not attach any special significance to the questions merely because the Court asked them. When I asked the questions it was because it involved an area that I thought

Charge

presented a bit of confusion and I thought if I were confused by it you might well be too. That was the only purpose of asking the questions.

Questions and answers stricken from the record are not part of the record. Just as I directed the reporter to physically strike it from his record, so you are directed to figuratively strike it from your recollection. The fact is once it's out of the record you should not consider it. In the same vein you may not speculate on what the answers to questions might have been had the Court not sustained objection to those questions. I ruled on those questions as a matter of law, and you can't guess what the witness might have said, it's not in the record and therefore you may not consider it.

Now, what is evidence? Evidence is the method which the law uses to prove a disputed fact or to disprove a disputed fact. Evidence is generally classified as either direct evidence or circumstantial evidence. The direct evidence is the testimony on a disputed fact to which the witness testifies directly. Circumstantial evidence, on the other hand, is a method of proving or disproving a disputed fact by the jury drawing an inference based on good common sense and

experience from the established facts.

In this regard I'll give you my usual and now has become my traditional example of the difference between direct and circumstantial evidence. You must first identify the disputed facts. If you are sitting here as a jury in a personal injury case and the plaintiff claimed that she was struck by the defendant while he was driving his car on a particular day at a particular place when the defendant passed a stop-sign without stopping. Now, let's assume that my courtroom deputy, Mr. Adler and myself, were standing on the corner at the particular time and place where the plaintiff claimed the injuries were inflicted. If I had my back to the roadway and to the stop sign, and my courtroom deputy facing me and facing the roadway and the stop sign were in that situation in those positions, our view of the accident would be entirely different. Again, identifying the disputed fact, the defendant denies that he passed a stop sign without stopping. He claimed that he stopped first and then proceeded. Mr. Adler if he were called to the stand, he would say well, I was talking to the Judge, at this time and place and I saw the defendant's motor vehicle, a 1977 Cadillac travelling at the rate of 70 miles an

hour, he continued at the same speed, passed the stop sign at the same speed and struck the plaintiff Mrs. A, that is direct evidence on that issue, passing the stop sign without stopping.

If I were called to the stand I could not give direct testimony on that because I didn't see the motor vehicle pass the stop sign, and I might testify while I talked to Mr. Adler I saw this motor vehicle coming down the roadway travelling about 70 miles an hour, I lost sight of it over a distance of about 150 feet and then two or three seconds later I turned and I saw the motor vehicle travelling at the same rate of speed and struck the plaintiff. I think you will agree with me that from my testimony alone, if you used your good common sense and experience you would infer from the circumstances that that motor vehicle passing behind me passed a stop sign without stopping; the circumstances well, the car was travelling 70 miles an hour, it reversed about 150 feet, in this two or three seconds, I saw it at the same rate of speed. From all of those circumstances I think you would come to the conclusion -- aside from Mr. Adler's testimony -- that that motor vehicle passed a stop sign without stopping. In other words,

the jury is equipped with good common sense. Your experience has dictated to you that the established fact is that car passed the stop sign without stopping.

The law doesn't hold that one type of evidence is of better quality than the other. In some circumstances the circumstantial evidence is better than direct evidence; and in some circumstances direct evidence is better than the other, than circumstantial evidence.

While I was charging you I was thinking that is a bad word to use, "Circumstances", when you are talking about circumstantial evidence, but I think you get the right idea. You have to be careful about using words in different circumstances.

I have used the term inference, and I have used the term presumption. There is a difference. An inference is a conclusion which reason and common sense leads the jury to draw some facts which have been established by the evidence in a case. The jury may draw an inference.

A presumption on the other hand is a conclusion which the law requires the jury to make and continues only so long as it is not overcome or outweighed by evidence in the case to the contrary,

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2 But unless and until the presumption is so outweighed
3 the jury is bound to find in accordance with the
4 presumption, and of course, the example of that is
5 the presumption of innocence.

6 You the jurors are the sole judges of the
7 credibility of the witnesses, which means the believ-
8 ability of their testimony and the weight their
9 testimony deserves. Scrutinize the testimony given
10 and the circumstances under which each witness testified
11 and every matter in evidence which tends to show
12 whether a witness is worthy of belief. Take into
13 consideration the intelligence of the witness.
14 Take into consideration the difficulty -- in this case
15 the witness has in conveying his thoughts because
16 of the language barrier. Take into consideration
17 the motive of the witness testifying and the
18 witness' state of mind. In other words, why is the
19 witness testifying? What is the witness' state of
20 mind? What is he thinking of while he's on the stand
21 testifying? Take into consideration the demeanor
22 of the witness while on the witness stand and the
23 manner in which he answers questions. Is he giving
24 full answers? Is he avoiding full answers? Does
25 he know or was he in position to know of the informati

or have the information that the questions searched out?

Take into consideration the witness' own ability to observe the matters as to which he testified, whether he shall impress you as having an accurate recollection of these matters. Take into consideration the relationship each witness might bear to either side of the case; the manner in which the witness might be affected by the verdict, the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

(continued next page)

Charge of the Court

There was some evidence offered that prior to the time a witness took the witness stand he had made a statement that was inconsistent with the testimony given to you while under oath. This is called impeaching testimony; attacks on the credibility of the witness. Of course, not every variation between what he said before and what was testified is inconsistent. Sometimes and oftentimes witnesses in retelling their version of what occurred say it a little differently. Sometimes the variations give support to the credibility of the witness. If a witness testified each time in the repetition of what occurred in exactly the same language, using exactly the same gestures and exactly the same pauses, you might suspect that testimony as being rehearsed and staged. So, again, use your good common sense and experience. Take into consideration the circumstances under which the witness gave the previous testimony. In Mr. Gallego-Henao's case that he was under a strain, and there was a language barrier.

You determine whether the inconsistency was as to a material or immaterial matter, after you determine that, you determine the effect, if any, the prior inconsistent statement has on the credibility of the

witness.

Mr. Jaramillo -- you understand J is pronounced like an H -- I think Jaramillo was pronounced both ways here -- said that he participated in the crime charged. Mr. Jaramillo as an alleged accomplice is not incompetent to testify because of his participation in the crime charged. On the contrary, the testimony of an alleged accomplice alone, if believed by the jury to be true beyond a reasonable doubt, may be of sufficient weight to sustain a verdict of guilty even though not corroborated or supported by other evidence in the case. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe the unsupported testimony to be true beyond a reasonable doubt. If a witness is shown to have knowingly testified falsely concerning a material matter, you have the right to distrust all such witness' testimony, or you may decide to accept so much of that witness' testimony that you believe is credible. That principle underlies or underscores the broad discretion the jury has in assessing the credibility of

Charge of the Court

witnesses.

The law does not compel a defendant in a criminal case to take the witness stand and testify. In this case the defendant took the stand and testified. A defendant who wishes to testify as a witness is competent to testify. You must judge the defendant's testimony in the same manner as any other witness.

The defendant called to the stand Mr. and Mrs. Hurtado as character witnesses and a letter of the employer was in the nature of character evidence. The evidence offered opinions of how the community thinks and feels about the defendant Gallego-Henao, and personal opinions as to his work habits, his ability to tell the truth, his honesty, his integrity and his behavior as a law abiding citizen.

Evidence of the defendant's reputation and personal opinion expressed by witnesses inconsistent with those traits of character ordinarily associated with the crimes charged here may give rise to reasonable doubt since the jury may think it improbable that a person of such good character in respect to those traits would commit such a crime. Evidence of good character should be considered with all the other

Charge of the Court

evidence in the case in determining whether the Government has proved guilt beyond a reasonable doubt.

The Government offered evidence of defendant's statements made upon his arrest. Evidence of such statements after a crime has been committed should always be considered with caution and weighed with great care. All such evidence should be disregarded entirely unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement was knowingly and voluntarily made. In other words that the defendant was aware that he was making such statement and that he made it deliberately and intentionally.

In determining whether any statement or act or omission claimed to have been made by the defendant outside of court and after a crime has been committed was knowingly made, the jury should consider the defendant's age, his education, his occupation and physical and mental condition at the time of making the statement. Consider also that he made the statement while in custody and under interrogation. All the other circumstances in evidence surrounding the making of the statement, including whether he was advised of his Constitutional Rights before he made

Charge of the Court

such statement -- and we call them Miranda Rights or Warnings -- that he was advised and was fully aware that he was not obligated or required to make any statement; that any statement he made might be used against him in a Court of Law; that he's entitled to the assistance of counsel before making the statement; that he knew if he didn't have the funds to retain counsel that the Court would appoint counsel. If you are not convinced beyond a reasonable doubt that he was advised of all his Miranda Rights and Warnings, and you are not entirely convinced beyond a reasonable doubt that his statements were in fact knowingly, voluntarily made, then disregard such evidence.

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Charge of the Court

Now, we come to the indictment. The indictment is really a method by which the defendant is brought into court to answer the charges. The allegations of the counts in the indictment are not to be considered as proof. Proof comes through the evidence in a case; the testimony; the exhibits; stipulations or admissions; the Court judicially noticing facts. You are not to attach any significance to the fact that the indictment is brought in the name of the United States. The prosecution and the defense or defendant are equals in this court. The obligation of the prosecution and the rights of the defendant are not to be reduced because the prosecution is by the United States of America. The Congress defines what is a crime. The Congress enacted what is commonly called the Drug Abuse and Control Act of 1970, it became effective May 1, 1971. It provided a comprehensive plan for the control of drugs, narcotic drugs and non-narcotic drugs. It closely supervised the importation, the manufacture, receipt, sale and distribution of drugs by narrowly permitting the importation, sale and distribution, and providing that such activity outside of the narrowly permitted uses would be criminal.

First, it created schedules of drugs under

Charge of the Court

certain categories; and under Schedule 2, it provided that cocaine is a Schedule 2 drug in the following language.

"Coca leaves and any salt compound, derivative or preparation of coca leaves"; and I charge you that cocaine hydrochloride the subject of this indictment is a Schedule 2 narcotic drug. You'll find when I read the indictment there are some references to the sections. So to give the indictment some meaning when I read it to you, I'll read the statute upon which the indictment was based. Very briefly it says:

"Except as authorized by the subchapter" -- and I charge you that the activities charged here are not authorized -- "It shall be unlawful for any person knowingly or intentionally" -- now, those two words are important, "knowingly" means that the party is aware, that he doesn't do the act through ignorance or innocence or error or negligence, that he's aware, in this case, this cocaine.

In every crime we have two general elements, one is criminal intent and the other is the proscribed conduct, the act; and you'll find that the essential elements of these crimes charged, that I will charge you on has the criminal intent and the prohibited

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Charge of the Court

conduct. So that phrase is important "knowingly and/or
intentionally possessed with intent to distribute
a controlled substance". That's what the statute
prohibits.

(Continued on next page)

2 Now, that's what we call a substantive crime.

3 The statute says you may not possess with intent to
4 distribute. In other words it goes beyond possession
5 for one's self; possession with intent to sell it,
6 distribute it. And then further on in Section 846
7 of Title 21 it prohibits anyone from entering into
8 a conspiracy, which I'll charge you later, where
9 people get together and actually go into the business
10 of dealing in cocaine.

11 "Any person who conspires to commit any offense
12 defined in this subchapter" commits another crime.
13 This requires two or more; the other is a crime
14 requiring any individual. Then further on in 952
15 it says, "(a) It shall be unlawful to import into
16 the custom's territory of the United States from
17 anyplace outside thereof any controlled substance
18 in Schedule I or II" and then in Section 960 it
19 defines the crime in this brief language:

20 "Any person who contrary to Section 952
21 knowingly or intentionally imports a controlled
22 substance" is guilty of the crime.

23 And then further on -- go back to 951 -- it
24 gives some definitions, "The term 'import' means with
25 respect to any article, any bringing in or introduction

Charge of the Court

of such article into any area (whether or not such bringing in or introduction constitutes an importation in the meaning of the tariff laws of the United States) ."

The defendant is charged with committing three crimes. Count 1 is a conspiracy charge based on Section 846 and 963. I might as well read 963, which I did not read. This refers to a conspiracy referring to the importation.

"Any person who conspires to commit any offense defined in subchapter" -- and the subchapter refers to the importation -- Is guilty of a crime

Count 1 charges as follows -- and first I'll charge you on Count 1 because this is a different concept than on Count 2 or 3, then I'll charge you on Count 2 and 3.

Again, the allegations in the charge are not proof of the charge and again I tell you that the defendant has said not guilty to each and every charge which puts the Government on its proof to show beyond a reasonable doubt that he did commit these crimes.

Count 1: On or about and between the first day of February, 1977 and the 26th day of February, 1977, both dates being approximate and inclusive within

Charge of the Court

the Eastern District of New York and elsewhere, the defendants Leon Ovido Rodriguez and Fabio Gallego-Henao together with others known and unknown to the Grand Jury did knowingly, intentionally and willfully combine, conspire, confederate and agree together and with each other to violate sections 841 (a) (1), 952(a) and 960(a) (1) of Title 21, United States Code.

And now the Court sets forth the objective, the purpose of the business, the conspiracy.

1. It was part of said conspiracy that the defendant and others would knowingly and intentionally import into the United States from places outside thereof quantities of cocaine, a Schedule 2 narcotic drug controlled substance.

2. It was further a part of said conspiracy that defendants and others would knowingly and intentionally distribute and possess with intent to distribute quantities of cocaine, a Schedule 2 narcotic drug controlled substance.

3. It was further a part of said conspiracy that the defendant and others would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities, or in violation of Title 21, United States Code 846

Charge of the Court

and 963, which are the conspiracy statutes.

So it's a conspiracy to violate the other laws that this court charges the defendant with doing. A conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose. In this case, the conspiracy to bring in cocaine, and to go into the business of selling cocaine. The statutory language being "to possess with intent to distribute".

Conspiracy is a kind of partnership in crime in which one conspirator or partner becomes the agent for the other members of the conspiracy. The gist of the offense is a combination or agreement to disobey or disregard the law. Mere similarity of conduct between various persons and the fact that they may have been associated with each other may have assembled together, discussed common aims and interests, does not necessarily establish proof of a conspiracy.

And the evidence in the case need not show that the members got together, as you might expect in a legitimate partnership, by a formal agreement, where all the terms were settled on and everyone knew exactly who was in the partnership and exactly what each one was to do. The Government need not prove that, and indeed, the Government doesn't claim that.

Charge of the Court

The Government claims that in this partnership that the parties knew and understood by their actions what the purpose of the partnership was and what the role of each member of the conspiracy was.

The evidence in the case must show beyond a reasonable doubt in order to establish proof that a conspiracy existed that the members in some way or manner or through some contrivance positively or tacitly came to a mutual understanding to try to accomplish the importation and possession with intent to distribute the cocaine that was imported.

The evidence in the case must establish beyond a reasonable doubt through the statements and actions of the alleged conspirators that it was knowingly formed, and that one of the methods described in the indictment were agreed upon in an effort to accomplish the purpose or business of the partnership or conspiracy.

Now, one may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand a person who has no knowledge of the conspiracy but happens to act in a way to further some object or purpose of the conspiracy does not thereby become a conspirator. In other words,

Charge of the Court

accepting the position of the defendant, the mere fact that he went to the airport continuously over a period and received papers from the Pan American Cargo Room and delivered them to some individual who may have been in the cocaine business does not make the defendant a conspirator. The mere fact that he helped accomplish the purpose of the conspiracy does not bring him into the conspiracy. The mere fact that he acted in a way that a conspirator acts does not make him a conspirator.

(Continued on next page)

Charge of the Court

The Government must prove beyond a reasonable doubt that was aware that he was helping in accomplishing the purpose of the conspiracy in furthering its cocaine business, otherwise the Government has not proved its case, in other words, that the conspiracy to import and distribute cocaine was knowingly formed.

The Government may prove the knowing formation of the conspiracy by the acts or statements of those alleged to be conspirators. The Government must also prove beyond a reasonable doubt that the accused knowingly and willfully became a member of the conspiracy, that is, that he participated in the activities of the business of dealing in cocaine, importing and distributing cocaine, and intentionally and voluntarily, deliberately performed those activities; and he did it for the purpose of advancing the business of the conspiracy.

The Government must prove beyond a reasonable doubt that the defendant performed those acts willfully. In other words, going to the airport, pick up the newspapers, knowing that there was cocaine concealed in the fold of a newspaper and delivering the newspaper to Mr. Martin Caro or William, or whoever he delivered them to, and that he did it intentionally,

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deliberately knowing that he violated the law.

The Government claims that the role of the accused was to pick up the packages of newspapers imported from Colombia through Avianca Airlines in which cocaine was concealed and to deliver those bundles or packages to Leon Rodriguez or William or Martin Caro.

The defendant testified that he picked up the packages or bundles containing newspapers imported from Colombia but that he was unaware of what was concealed in the newspapers. The Government must prove that the defendant acted knowingly and willfully. The Government does not have to prove that the accused saw the cocaine in the newspapers at anytime. If the Government proves beyond a reasonable doubt that the defendant knowingly and intentionally avoided learning what was in the newspapers by refusing to go to the sources of information that were readily available to him for the very reason that he did not want to know, the Government then has proven criminal knowledge. Of course, the mere fact that the accused was present while conspiratorial activities were going on, and that he even knew that the conspiracy was going on does not prove participation

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in the criminal conspiracy. The Government must prove an activity, participation, a knowing and willfull participation by the accused for the purpose of advancing the business of the conspiracy.

You are not to determine the guilt or innocence based on the degree of culpability. Your determination is solely as to whether or not the accused knowingly and willfully entered into the conspiracy; the determination as to whether or not he performed a major or minor role is not within the authority of the jury. The guilt of Leon Rodriguez and/or Martin Caro -- and I'm not passing on whether or not they are the same individuals, that's your function; or others is not your concern. Of course, evidence as to the participation of Leon Rodriguez is important on the issue of whether a conspiracy existed, because again, no one can conspire with themselves. There must be another party. So to that extent, of course, evidence as Mr. Rodriguez' activities is important. Evidence of Mr. Jaramillo's activities is important on the question of the credibility of Jaramillo, and I charge you with reference to his credibility as a witness; and I charge you on how to treat the testimony of an accomplice. But you are not to concern

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2 yourselves with guilt as such of any of the co-
3 conspirators other than the reference I just made
4 to their possible guilt.

5 First determine whether or not the conspiracy
6 existed. If you conclude that the conspiracy did
7 exist then again the standard of proof is beyond a
8 reasonable doubt, you should next determine whether
9 or not the accused knowingly and willfully became a
10 member of that conspiracy. If it appears beyond a
11 reasonable doubt from the evidence in the case that
12 the conspiracy alleged in the indictment did exist,
13 and that the accused knowingly and willfully became
14 a member of the conspiracy, and that thereafter one
15 or more of the conspirators knowingly committed an
16 overt act in furtherance of some objective or purpose
17 of the conspiracy, then the Government shall have
18 proved the essential elements of the crime charged.

19 (Continued on next page)
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Charge of the Court

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2 An overt act is any act knowingly committed --
3 and again it means being aware that it was to
4 advance the purpose of the conspiracy -- by one of
5 the conspirators in an effort to effect or accomplish
6 some object or purpose of the conspiracy.

7 One who willfully joins an existing conspiracy
8 is charged with the same responsibility as if he
9 had been one of the originators or instigators of
10 the conspiracy. It doesn't matter at which point
11 conspirator enters, if he does it knowingly, willfully,
12 he's charged with everything that happened before.

13 In determining whether or not a defendant
14 or any other person was a member of the conspiracy,
15 the jury is not to consider what others may have said
16 or done, that is to say membership in the conspiracy
17 may be proved only by proof as to the accused acts
18 and statements.

19 Now, the law charges an accused only with what
20 the accused has said or done; an exception is carved
21 out of that rule in the case of a conspiracy. An
22 accused is chargeable under some circumstances with
23 acts or declarations of members of the conspiracy
24 just as in a partnership, where one partner does a
25 legitimate act the other partners are charged with it.

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One partner goes out and buys merchandise for the partnership, the partnership is responsible; the partner who made the purchase is an agent for all.

In a criminal conspiracy if one partner or conspirator says or does something outside the presence of an accused, that accused may be chargeable with that statement or activity if the Government proves beyond a reasonable doubt.

One, that the conspiracy charged existed.

Two, that the individual who made the statements or performed the act knowingly and willfully became a member of that conspiracy;

And three, that the defendant or accused knowingly, willfully became a member of the conspiracy. If all that is proved then a defendant may be charged with acts or declarations of co-conspirators made during the term of the conspiracy and in furtherance of the objectives of the terms of the conspiracy. If the Government doesn't prove that then disregard such statements made outside the presence of the accused.

I list the four essential elements of the crime charged.

1. That a conspiracy described in the indict-

ment was knowingly and willfully formed and existing at or about the time alleged for the purpose set forth in the indictment.

2. That the accused knowingly and willfully entered the conspiracy being aware that it was for the purpose of illegally importing cocaine into the United States and for the purpose of distributing and possessing cocaine.

3. That one of the conspirators thereafter committed an overt act;

4. That such overt act was knowingly committed in furtherance of some objective or purpose of the conspiracy.

The Government must prove all those essential elements of the crime charged before you may the defendant guilty.

Now, let's go to Count 2 and Count 3. Count 2 charges:

On or about the 25th day of February, 1977, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendants Leon Ovido Rodriguez and Fabio Gallego-Menao, did knowingly and intentionally import into the United States from Colombia approximately

1,473 grams of cocaine hydrochloride, a Schedule 2 narcotic drug controlled substance in violation of Title 21, United States Code, Section 952(a); Section 960(a)(1) and Title 18 United States Code, Section 2.

Now this count charges the accused with importing the cocaine. Well, the evidence doesn't show that he actually brought it into the country. The theory here of the Government is that the defendant aided and abetted the party who imported it. Title 18 of Section 2 charges an aider and abettor as if he were a principal. It says:

"Whoever commits an offense against the United States or aids and abets, counsels, commands or induces or procures its commission is punishable as a principal."

In a case where two or more persons are charged with the commission of a crime the guilt of any defendant may be established without proof that he personally did every act constituting the offense charged.

In order to aid and abet a crime it is necessary that the accused willfully associate himself in some way with the criminal venture and willfully

participate in it as he would in something he wishes to bring about.

The act of defendant charged here in picking up the newspapers, the Government charges aided and abetted the importation. The Government must prove beyond a reasonable doubt that the accused performed the act voluntarily and intentionally and with specific intent to violate the law against importing cocaine. You, of course, may not find the defendant guilty unless you find beyond a reasonable doubt that the crime was actually committed.

Everytime I charge on conspiracy and aiding and abetting, I say to myself, should I tell the jury the difference? If there really a difference? The only answer to that question is that there is a theoretical difference. The theory of a conspiracy is the agreement, the getting together and committing one overt act -- at least one overt act. It isn't necessary that the conspiracy succeed in its purposes, and if I had that kind of a case then I'd say then that's the difference, conspiracy in one case and aiding and abetting in the other; but where the evidence shows that the conspiracy succeeded all I can say is that it's only a theoretical difference,

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and I think I would leave it at that and I hope you understand what I mean by it.

The evidence shows that the newspapers were imported. I don't know whether the evidence shows that the conspiracy distributed, or possessed with intent to distribute.

(Continued on next page)

Charge

I may say to you that in proving the conspiracy the Government need not prove all its objects and purposes but it must prove at least one of the objects and purposes that was agreed upon were used in order to accomplish the object or purpose of the conspiracy. Every person who wilfully participates in the commission of a crime may be found guilty of aiding and abetting.

Again, participation is wilfull if done voluntarily and if done intentionally and not through some error or mistake or ignorance. So on count two, the Government must prove beyond a reasonable doubt one that on or about February 25, 1977, the accused imported into the Customs territory of the United States from Colombia, approximately 1473 grams of cocaine hydrochloride, a schedule two narcotic drug controlled substance;

Two, that such importation was done knowingly and intentionally. And, of course, in this case, you must find that that crime was committed, and in order to charge the defendant you must find that he aided and abetted in the commission of the crime.

Count three charges as follows:

On or about the 25th day of February, 1977,

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within the Eastern District of New York, the defendants Leon Ovidio, Rodriguez and Fabio Gallego did knowingly and intentionally possess with intent to distribute approximately seven hundred and thirty four grams of cocaine hydrochloride, a Schedule Two narcotic drug controlled substance in violation of Title 21 United States Code Section 841 (a)(1) and Title 18, United States Code Section 2.

Here the defendant is charged with possessing cocaine with intent to distribute; and as I advised you before, the type of possession must be accompanied by an intention to sell it or distribute it, not possession alone.

In order to convict on count three the Government must prove beyond a reasonable doubt that on or about February 25th, 1977, the accused possessed approximately seven hundred and thirty four grams of cocaine hydrochloride a schedule II narcotic drug controlled substance; and two, that the accused knowingly possessed of the said cocaine and possessed it with intent to distribute the cocaine.

During your deliberations you may want to communicate with the Court. All your communications must come through your foreman, the number one juror.

Charge

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2 If you want some testimony read back I ask you to
3 try to identify the witness and if possible, the
4 subject matter of the testimony. We are favored here
5 with a transcript of the testimony. Don't ask me whether
6 a particular witness testified as to any particular
7 matter. If I gave you the answer to that that would
8 be encroaching on your jurisdiction, I would be telling
9 you what I think, which would be wrong. You are to
10 tell me what you think. I can do nothing more, than
11 to have sort of a replay. If you want certain testi-
12 mony I'll try and find it for you and I'll read it
13 back for you.

14 Try to be as precise as you can in asking for
15 a rereading of testimony because if you just said
16 the testimony of so and so, and you don't identify
17 the subject I sometimes have a question with the lawyers
18 about how much of it should be reread. Each lawyer
19 of course wants me to reread the part that he thinks
20 is favorable to himself; he wants to get it again
21 before the jury. I am interested only in answering
22 your question and the only way I can play it safe is
23 to understand what your question is and give you only
24 what you are asking for, no more, and no less.
25 Now, that is not always easy, but it makes the task

Charge

easier if you're definite.

I won't send any of the exhibits in and I won't send the cocaine in, but if you want any of the exhibits identify them. If you want all of the exhibits except the cocaine, I'll send them all in, but I won't send it in unless you ask for it. That's the point.

Now, of course, each juror must decide the case by himself or herself. The jury process is a deliberative process, it's an exchange of views always based on the evidence. What does the evidence show? Has the Government proved its case beyond a reasonable doubt? It's wrong for any juror to come into the jury room and in effect say, "Well, my name is get along with everybody, Martin or Mollie, and I don't want to argue with anybody so when you come up with a verdict I will go along with you, that is wrong. If it's equally wrong for any jury to take an obdurate view, and intransigent view, it's wrong for any juror to come into the jury room and say, "Here's the way I feel about it, don't talk to me about it. When you come around to my way of thinking let me know." That too is wrong. If you arrive at a tentative verdict on what you believe the verdict

Charge

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2 should be and after an exchange of views you decide
3 that there is something to what the others say and
4 you may have been wrong in the first instance and
5 then, of course, always based on the evidence, if
6 you can with good reason, and you don't have to give
7 anybody the reason, but in your own mind with good
8 reason, then of course change it.

9 The verdict must be unanimous.

10 During your deliberations don't send me any
11 note that says, "Well, we are six to six or eight
12 to four or ten to two, or eleven to one, I am not
13 interested. It wouldn't be proper for you to tell
14 me that.

15 When you have arrived at a unanimous verdict,
16 just tell me that the verdict is unanimous or that
17 you have your verdict. Don't tell me what the verdict
18 is. When I get the note I'll call you into court
19 and I will say in effect, in the case of United States
20 of America against Fabio Gallego Henao, how do you
21 find the defendant as to count one, guilty or not
22 guilty; as to count two, guilty or not guilty;
23 as to count three, guilty or not guilty. When the
24 foreman gives me that verdict, then I will turn to
25 juror number two and in effect ask whether she has

Charge

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2 heard the verdict and if she has whether that's also
3 her verdict. If she says, yes, sir, I'll go on to
4 three, four, five and until I get twelve yeses.
5 When I get twelve yeses, then I have the verdict of
6 this case and I have the verdict for the first time
7 in open court and reported by the court reporter.

8 Now, at this point I ask you to leave the
9 courtroom. Don't start your deliberations yet. I
10 want to talk to the lawyers.

11 Every note that you send me, if you send me any,
12 I discuss with the lawyers. I want to be sure that we
13 agree on what the note means and how I should proceed
14 from here on. So I am doing the same thing now.
15 So take leave of the Court and I'll call you back in
16 a few minutes.

17 (Whereupon, jurors were excused from the
18 courtroom.)

19 THE COURT: Any exceptions or additions?

20 MR. CARTER: I would like to ask one question.
21 I think the jury may have been left with the impression
22 that they had to find that Miranda Rights were given
23 in order to consider any statement from the defendant.
24 My understanding on the law is that voluntariness is
25 the only issue and the Miranda --

1 THE COURT: Do you know that the Supreme Court
2 has not decided that, so I took the narrower view that
3 they have to prove both.

4 MR. CARTER: All right.

5 THE COURT: Incidentally, it really was before
6 the Supreme Court in a case where they held five to
7 four, where they set aside the verdict because he
8 had a lawyer and said -- I forget the name of the
9 case -- and very well could have said it right then
10 and there, but they didn't.

11 I charged, because I took what might be a
12 conservative view. There was no sense of taking
13 chances here.

14 Any exceptions or additions?

15 MR. TIRELLI: At one point it might have been
16 a statement that Gallego's guilt or innocence should
17 be considered with respect to the conspiracy count,
18 count one, and I think that it should be pointed out
19 that the only question is whether or not Leon
20 Rodriguez is guilty or innocent. I don't know if
21 Jaramilio's guilt or innocence has anything to do
22 with the conspiracy in count one.

23 MR. CARTER: I believe the evidence tends to
24 establish Jaramilio was also a member of the conspiracy.

25 THE COURT: I said there was evidence in the

1
2 case that he was part of the conspiracy; you agree
3 with me?

4 MR. TIRELLI: Yes. Technically count one only
5 recites --

6 THE COURT: And others known and unknown to
7 the Grand Jury.

8 MR. TIRELLI: Ok.

9 THE COURT: Anything else?

10 Seat the jury.

11 (Whereupon, the jurors returned to the court-
12 room and are now seated in the jury box.)

13 THE COURT: At this point I'll excuse Mr.

14 Ferrell and Mr. Fitzpatrick, only twelve
15 jurors may deliberate on the matter. There has
16 been some legislation suggested that will permit alterna-
17 tes to sit by and hear about the deliberations, and
18 during the deliberations if a juror becomes ill or
19 is otherwise disabled, then permit an alternate to
20 participate, but until the Congress says so, we cannot
21 allow it, so you are excused with the thanks of the
22 Court.

23 Now, your lunch has been ordered and it will
24 be delivered to my office. If you come to my office
25 about noon time I suspect that you will get your lunch

Charge

but for now, will you please take anything you have in the jury room out of it. Will you do that now?

(Whereupon, two alternate jurors were excused from the courtroom.)

(Two alternate jurors returned to the courtroom)

THE COURT: All right, you are excused.

Will the clerk swear in the marshals?

(Whereupon, two marshals were sworn in by the clerk of the Court.)

THE COURT: Your lunch will be delivered about 12 o'clock. I'll ask the lawyers to remain in contact with me until at least 11:30; while they have their lunch it will be difficult for me to consult with them. I like jurors to know that I am available to answer all of their questions.

I must call your attention to a slight problem I have. I will be busy with another case probably across the hall so my delay in answering isn't that I don't want to give you the answer, it means that I cannot but as soon as I can, I'll answer your questions.

Now, you recall the oaths that you took and that is to render a true and just verdict. In turn that means to render a verdict on the evidence free of

1 47a all bias, prejudice or sympathy.

2 The jury is excused in the custody of the
3 marshals to deliberate on the matter before them.

4 (Whereupon, jurors were excused to begin
5 their deliberations.)

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